

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

NOV 16 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0237-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
EDWARD E. NORIEGA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200501566

Honorable Stephen F. McCarville, Judge
Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Edward E. Noriega

Tucson
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Edward Noriega seeks review of the trial court's July 8, 2009, denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., and the court's June 23, 2010, denial of his motion for reconsideration of that ruling. The following history is relevant to Noriega's claims on review.

¶2 Pursuant to a plea agreement, Noriega was convicted of two counts of attempted molestation of a child, classified as dangerous crimes against children, both committed during the summer of 2005. The trial court sentenced him to an aggravated, twelve-year prison term on the first count and, on the second count, suspended the imposition of sentence and placed him on lifetime probation, to commence after Noriega completes his prison sentence.

¶3 Noriega filed a notice of post-conviction relief, initiating an “of-right” Rule 32 proceeding, and the trial court appointed counsel to represent him. *See* Ariz. R. Crim. P. 32.1, 32.4(c)(2). After appointed counsel filed a notice advising the court that he had reviewed the record and had been “unable to identify any issues upon which to base a claim for relief,” the court granted Noriega a sixty-day extension to prepare a pro se petition. *See* Ariz. R. Crim. P. 32.4(c)(2). In the same order, the court granted counsel’s request to withdraw.

¶4 In his pro se petition, Noriega alleged his Rule 32 counsel had rendered ineffective assistance in “fail[ing] to raise issues of due process, equal protection of the laws[,] and fundamental fairness,” thereby “abandon[ing his] right to appeal and the appeal itself (sic).”¹ He also argued (1) his aggravated sentence violated the rules

¹By “appeal,” we assume Noriega meant his “Rule 32 of-right proceeding.” Ariz. R. Crim. P. 32.1. As a pleading defendant, Noriega has waived his right to a direct appeal. *See* A.R.S. § 13-4033(B) (no appeal from judgment or sentence entered pursuant to plea agreement); Ariz. R. Crim. P. 17.1(e) (pleading defendant waives “right to have the appellate courts review the proceedings by way of direct appeal, and may seek review only by filing a petition for post-conviction relief pursuant to Rule 32 and, if denied, a petition for review”).

announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004); (2) the trial court erred in sentencing him pursuant to former A.R.S. § 13-604.01, 2001 Ariz. Sess. Laws ch. 334, § 7,² for dangerous crimes against children, because the court had failed to identify any basis for finding Noriega’s offenses “dangerous”; (3) his sentences pursuant to former A.R.S. § 13-604.01 were illegal under our holding in *State v. Gonzalez*, 216 Ariz. 11, 162 P.3d 650 (App. 2007); and (4) the court abused its discretion in failing to consider Noriega’s mental health issues as a mitigating factor at sentencing.

¶5 On July 8, 2009, the trial court summarily denied relief on all of Noriega’s claims, finding Noriega had failed to substantiate his claim of ineffective assistance of Rule 32 counsel and had, in his plea agreement, expressly waived his right to a jury determination of aggravating circumstances, thereby waiving any claim pursuant to *Blakeley* or *Apprendi*. The court further found that Noriega had been properly sentenced pursuant to former § 13-604.01, which had defined dangerous crimes against children to include child molestation and, by incorporated reference, attempted child molestation,³ and that our decision in *Gonzalez* was not implicated. *See Gonzalez*, 216 Ariz. 11, ¶ 10,

²The Arizona criminal sentencing code has been renumbered, effective “from and after December 31, 2008.” *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For consistency with Noriega’s arguments, we refer in this decision to the section numbers in effect when he committed these offenses.

³The trial court’s order erroneously referred to Noriega’s convictions for “Child Molestation” and “Attempted Child Molestation,” rather than for two counts of attempted child molestation. This misstatement, however, does not affect the court’s correct analysis of the issues presented.

162 P.3d at 653. Finally, the court noted that it had considered Noriega's mental health issues as a mitigating circumstance at sentencing, but had found that this and other mitigating factors were outweighed by aggravating circumstances.

¶6 In February 2010, Noriega filed a "Motion for Reconsideration of Post[-]Conviction Relief," challenging the trial court's July 2009 ruling. Although Noriega acknowledged his motion was untimely, he argued he was not at fault for his delay because he had not received the court's ruling until January 22, 2010. As for the substance of his motion, Noriega raised a new allegation of sentencing error, asserting he was convicted of "attempted molestation of a child in the second-degree."⁴ He argued no such offense is defined by A.R.S. § 13-1410 or listed as a dangerous crime against children in former § 13-604.01, and he therefore was not subject to sentence enhancement under former § 13-604.01, to the imposition of lifetime probation pursuant to A.R.S. § 13-902(E), or to sex-offender registration requirements pursuant to A.R.S. § 13-3821. He also alleged the court had improperly permitted his Rule 32 counsel to withdraw, and argues his claims of sentencing error would have been stated more clearly if he "had . . . been provided effective counsel, or at a minimum, advisory counsel upon the filing of his pro[] per petition."

⁴Noriega provided no citation to the record to support this assertion. According to his plea agreement, Noriega pleaded guilty to "Attempted Molestation of a Child, a class 3 felony and dangerous crime against children in the second degree." The trial court's sentencing minute entry reflects his conviction for two counts of "attempted molestation of a child," each identified as a class three felony and dangerous crime against children.

¶7 On June 23, 2010, the trial court denied Noriega’s motion for reconsideration, finding it “was not timely filed and, in any event, is without merit as [Noriega]’s claims were fairly presented and decided.” This petition for review followed.

¶8 On review, Noriega argues the trial court erred in failing to conduct an evidentiary hearing before finding his motion for reconsideration was untimely. As the only other issue he presents for our review, he reasserts the claim of sentencing error he alleged in that motion. We review a court’s denial of post-conviction relief, and its denial of a motion for reconsideration, for an abuse of discretion. *State v. Sepulveda*, 201 Ariz. 158, ¶ 3, 32 P.3d 1085, 1086 (App. 2001). We find no abuse of discretion here.

¶9 We first consider the trial court’s summary denial of Noriega’s “motion for reconsideration” of the decision denying post-conviction relief. Because Rule 32 contains no provision for such a motion, we construe it as a motion for rehearing, which is permitted by Rule 32.9(a). Under that rule, “Any party aggrieved by a final decision of the trial court in these proceedings may . . . move the court for a rehearing setting forth in detail the grounds wherein it is believed the court erred.” Ariz. R. Crim. P. 32.9(a). But Noriega did not contend in his motion for reconsideration that the court had erred in denying the claims raised in his pro se petition; instead he sought to introduce an entirely new claim for sentencing relief. Because this claim was not included in Noriega’s pro se petition, it was never properly before the court; simply put, the court could not be asked to “reconsider” a ruling it had never made on a claim Noriega had not presented.

¶10 In addition, although Noriega challenges the trial court’s summary finding that his motion for reconsideration was untimely, he does not address the court’s

determination, as an alternative ground for denying that motion, that the claims Noriega had raised in his pro se petition had been “fairly presented and decided” in the court’s July 2009 decision. Accordingly, Noriega has waived our review of that conclusion which, standing alone, was a sufficient basis for denying Noriega’s motion. *See* Ariz. R. Crim. P. 32.9(c)(1) (failure to raise issue in petition for review “shall constitute waiver of appellate review of that issue”). He has therefore failed to establish that the court abused its discretion in denying his motion for reconsideration.

¶11 Similarly, Noriega has failed to establish, or even argue, that the trial court abused its discretion in summarily denying his pro se petition for post-conviction relief. On review, Noriega does not directly challenge the court’s July 2009 ruling or the court’s basis for denying the claims he had raised in that petition.⁵ *See id.* (petition for review shall contain issues “decided by the trial court . . . which the defendant wishes to present the appellate court for review”). Instead, he states he “disagrees” with the court’s conclusion that he was properly sentenced in accordance with § 13-604.01, based only on the new argument he later asserted in his motion for reconsideration. As addressed above, this argument was never properly before the trial court, *see* ¶ 8, *supra*, and we will not consider on review issues or arguments that have not been properly presented to or decided by the trial court. *Cf. State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (declining to consider issues first raised in petition for review).

⁵Noriega does point out that the July 2009 decision contains a mistaken reference to a conviction for child molestation, but, as we noted earlier, this error had no effect on the court’s substantive ruling. *See* n. 3, *supra*.

¶12 Noriega has failed to persuade us that the trial court abused its discretion in summarily denying his claims for post-conviction relief or in denying his motion for reconsideration of that ruling. Accordingly, we grant review but deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge